FILE COPY

Office - Supreme Court, U. S.
FILED
SEP 10 1947
CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,
vs.
JOSEPH SUNNEN,
Respondent.
No. 227.

BRIEF

Of Respondent in Opposition to Petition for Writ of Certiorari.

C. P. FORDYCE,
506 Olive Street,
St. Louis 1, Missouri,
Counsel for Respondent.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

INDEX.

	Page
Statement of Case	1
Question Presented	2
Statutes and Regulations Involved	4
Summary of Argument	5
Argument	9
1. The Decision of the Circuit Court of Appeals Does Not Conflict With Any Decision of This Court	9
a. Assignment of Income of Income-Producing Property	9
b. Substantial Ownership of Property—The Clifford Doctrine	14
c. Earned Income	22
2. The Judgment of the Circuit Court of Appeals Reflects No Abuse of Its Power to Review the Decision of the Tax Court	23
3. The Case at Bar Presents No New Question of Law Requiring Consideration by This Court	27
Conclusion	28

Citations.

Cases:

Abercrombie, J. S. Co. v. Commissioner, T. C. 120, affd. 5 Cir., ... Fed. 2d ..., 1947 C. C. H. Standard Fed. Tax Rep., Vol. 4, Par. 9301, decided 6/25/47	14
Allen v. First Natl. Bank, 5 Cir., 157 Fed. 2d 592	12
Armstrong v. Commissioner, 10 Cir., 143 Fed. 2d 700	24
Atwood v. City of Boston, 37 N. E. 2d 131, 310 Mass. 70	25
Backus, Estate of Standish v. Commissioner, 6 T. C. 1036, C. C. H. Dec. 15,142	20
Battista v. Horton, Myers & Raymond, 128 Fed. 2d 29	25
Bear Gulch Water Co. v. Commissioner, 9 Cir., 116 Fed. 2d 975	17
Betts, Commissioner v., 7 Cir., 123 Fed. 2d 534	20, 21
Bingham v. Commissioner, 325 U. S. 365	26
Blair v. Commissioner, 300 U. S. 5	11
Blank v. Coffin, 126 P. 2d 868, 20 Calif. 2d 457	26
Branch, Commissioner v., 1 Cir., 114 Fed. 2d 985	20, 21
Burnet v. Harmel, 287 U. S. 103	13
Busch, Commissioner v., 8 Cir., 148 Fed. 2d 798	16
Commissioner—See Name of Taxpayer	
Conant v. Commissioner, 7 T. C. 453	16
Copland v. Commissioner, 7 Cir., 41 Fed. 2d 501	9
Corning v. Commissioner, 6 Cir., 104 Fed. 2d 329	20
Crane v. Commissioner, ... U. S. ..., 91 L. Ed. 931	26
Crowe v. Geary State Bank, 123 Fed. 2d 513	25
Cushman v. Commissioner, 2 Cir., 153 Fed. 2d 510	21
Denholm & McKay Realty Co. v. Commissioner, 1 Cir., 139 Fed. 2d 545	26
Dobson v. Commissioner, 320 U. S. 489 (rehearing den. 321 U. S. 231)	23, 27
Dodson, Estate of J. G. v. Commissioner, 1 T. C. 416	24, 26
Eisenberg v. Commissioner, 3 Cir., 161 Fed. 2d 506, cert. applied for.	27
Emery v. Commissioner, 1 Cir., 156 Fed. 2d 728	16

Farmer v. Commissioner, 10 Cir., 126 Fed. 2d 542 26
Field v. Commissioner, 2 Cir., 42 Fed. 2d 820 ..... 9, 11
Fox v. Commissioner, 37 B. T. A. 271 ..... 12, 17
Friedman v. Commissioner, 45 B. T. A. 976, affd. 4 Cir., 130 Fed. 2d 305 12
Funk, E. M. v. Commissioner, 7 T. C. 890, C. C. H. Dec. 15,397 12
Funk, W. J. v. Commissioner, T. C. Memo Opinion, 3 T. C. M. 100, C. C. H. Dec. 13,727M, 1947 P-H T. C. Memo Dec. Par. 44,030 ..... 12, 17

Greenspun, Commissioner v., 156 Fed. 2d 917 ..... 17, 24

Hall v. Burnett, App. D. C., 54 Fed. 2d 443, cert. den. 285 U. S. 552 11
Hallowell v. Commissioner, 3 Cir., 160 Fed. 2d 536 24
Harrison v. Schaffner, 312 U. S. 579 14
Hash v. Commissioner, 4 Cir., 152 Fed. 2d 722 27
Hatfried Inc. et al. v. Commissioner, decided 6/11/47, 3 Cir., ... Fed. 2d ..., 474 C. C. H. Par. 9294 23
Hawkins v. Commissioner, 5 Cir., 152 Fed. 2d 221 24
Helvering v. Clifford, 309 U. S. 331 ..... 6, 8, 14, 22, 25, 26, 27
Helvering v. Enright, 312 U. S. 636 26
Helvering v. Eubank, 311 U. S. 122 14
Helvering v. Horst, 311 U. S., at p. 112 ..... 13, 14
Helvering v. Seatree, App. D. C., 72 Fed. 2d 67 11
Helvering v. Stuart, 317 U. S. 154 27
Helvering v. Tex.-Penn. Co., 300 U. S. 481 25
Hoeper v. Tax Commission, 284 U. S. 206, 52 S. Ct. 120, 76 L. Ed. 248 ..... 10, 21, 28
Horvath v. Sheridan, Wyoming Coal Co., 131 P. 2d 315, 58 Wyo. 211 25
Howard v. Texas Owyhee Mining & Development Co., 115 P. 2d 749, 62 Idaho 707 26
Howell Turpentine Co. v. Commissioner, 5 Cir., ... Fed. 2d ..., 474 C. C. H. Par. 9281, decided 6/4/47 24

Jergens v. Commissioner, 5 Cir., 136 Fed. 2d 497 16
Jones v. Norris, 10 Cir., 122 Fed. 2d 6 21

Katz, Commissioner v., 7 Cir., 139 Fed. 2d 107 20

Leydig v. Commissioner, 15 B. T. A. 124, affd. 10 Cir., 43 Fed. 2d 494. 9
Lilienfeld v. Commissioner, 35 B. T. A. 391 11
Lincoln Electrical Co. v. Commissioner, ... Fed. 2d ..., 474 C. C. H. Par. 9282, 6 Cir., decided 6/5/47 26
Littel v. Commissioner, 154 Fed. 2d 922 27
Lowery v. Helvering, 2 Cir., 70 Fed. 2d 713 ..... 9, 11
Lucas v. Earl, 281 U. S. 111, 74 L. Ed. 731 22
Lum v. Commissioner, 3 Cir., 147 Fed. 2d 356 ..... 11, 14

Mallinckrodt v. Nunan, 8 Cir., 146 Fed. 2d 1 16
McWilliams v. Commissioner, ... U. S. ..., 91 L. Ed. 1383 26
Moline Properties Inc. v. Commissioner, 319 U. S. 436 ..... 17, 20
Montgomery, Commissioner v., 5 Cir., 144 Fed. 2d 313 ..... 12, 15, 17
Montgomery v. Thomas, 5 Cir., 146 Fed. 2d 76 12

Nelson v. Ferguson, 3 Cir., 56 Fed. 2d 121, cert. den. 286 U. S. 565 .. 9, 11
Nelson v. Montgomery, Ward Co., Inc., 312 U. S. 373 11

O'Donnell, Commissioner v., 9 Cir., 90 Fed. 2d 907 11

Pearce v. Commissioner, 315 U. S. 543 ..... 14, 28
People v. Marsicano, 135 P. 2d 16, 57 Calif. App. 2d 591 25
Pepper v. Litton, 308 U. S. 295 16
Poe v. Seaborn, 282 U. S. 101, 51 S. Ct. 58, 75 L. Ed. 239 10
Porter Royalty Pool, Inc., v. Commissioner, 7 T. C. 685, C. C. H. Dec. 15,362 ..... 12, 14

Ray, Rose L. v. Commissioner, 1941 P-H, B. T. A. Memo Dec. Par. 41,325, C. C. H. Dec. 11,874 (A) 11
Reinecke v. Northern Trust Co., 278 U. S. 339 20
Richardson v. Commissioner, 2 Cir., 121 Fed. 2d 1, cert. den. 314 U. S. 684 16

Ross, Commissioner v., 6 Cir., 83 Fed. 2d 18 11
Ross, Estate of W. L. v. Commissioner, T. C. Memo Opinion, 2 T. C. M. 573, C. C. H. Dec. 13,416M 12
Scottish American Investment Co., Ltd., Commissioner v., 323 U. S. 119 24
Shanley v. Bowers, 2 Cir., 81 Fed. 2d 13 ..... 11, 20
Smith et al., Extrs. v. Commissioner, 25 B. T. A. 291 9
Solace v. T. J. Moss Tie Co., 142 S. W. 2d 1079 25
Strauss v. Commissioner, 8 T. C. No. 121, C. C. H. Dec. 15,787 11
Suhr v. Commissioner, 6 Cir., 126 Fed. 2d 283 21
Sunderland v. Commissioner, 3 Cir., 151 Fed. 2d 675 24
Sunnen v. Commissioner, 6 T. C. 431, rev'd 161 Fed. 2d 171 11
Swastz, Inc., Edw. G. v. Commissioner, 5 Cir., 69 Fed. 2d 633 ..... 9, 10, 14, 17
Thornley v. Commissioner, 3 Cir., 147 Fed. 2d 416 25
Timken, Estate of H. H. v. Commissioner, 47 B. T. A. 494, affd. 6 Cir., 141 Fed. 2d 625 11
Titus v. Stouffer, 40 N. E. 2d 178 26
Tower, Commissioner v., 327 U. S. 280 22
U. S. v. Morss, 1 Cir., 159 Fed. 2d 142 ..... 15, 21
U. S. Trust Co., Commissioner v., 2 Cir., 143 Fed. 2d 243 26
Wachovia Bank & Trust Co., Trustee et al., v. Commissioner, 3 T. C. M. 595, C. C. H. Dec. 14,001M, 1944 P-H, T. C. Memo Dec., Par. 44,217 18
Ward v. Commissioner, 9 Cir., 58 Fed. 2d 757 14
Wheelock v. Commissioner, 7 T. C. 98, C. C. H. Dec. 15,216 ..... 12, 18, 19, 20
Wilcox, Commissioner v., 327 U. S. 404 ..... 6, 8, 19, 21
Wilson, Commissioner v., 7 Cir., 125 Fed. 2d 307 24
Wolkowsky v. Goodkind, 14 So. 2d 398, 153 Fla. 267 26

Other Authorities:

Revenue Bill of 1941, H. R. 5417 as Introduced, 77th Congress, First Session, Sec. 111, H. Rep. No. 1040, 77th Congress, First Session, p. 19 21
Congressional Record, Vol. 87, Part 6, pp. 6727, 6732 21
"Mandatory Joint Returns," Joint Committee on Internal Revenue Taxation, U. S. Government Printing Office 1941 21

Regulations:

Reg. 111, Sec. 29.22 (a)-22, 471 C. C. H. Par. 86B 16
Reg. 103, Sec. 19.22 (a)-1 4
Reg. 101, Art. 22 (a)-1 4
Reg. 94, Art. 22 (a)-1 4

Textbooks:

13 Fletcher "Cyclopedia of the Law of Private Corporations," pp. 137, 141, 144, 147, 154, 156 16
18 C. J. S., p. 1194 16
13 Am. Jur., p. 477 16
1 Sugden on "Powers," 3d Am. Ed. 371 20
4 Am. Jur., "Assignments," Sec. 105, p. 312 16
6 C. J. S., Sec. 96, p. 1152, Sec. 101, p. 1158 16
Merten's "Law of Federal Income Taxation," Vol. 9, Pocket Supplement, Sec. 51.19, p. 101 26

Statutes:

Sec. 22, Internal Revenue Code, 26 U. S. C. 1940 ed., Sec. 22 4
Sec. 22, Rev. Act. 1936, c. 690, 49 Stat. 1648 4
Sec. 22, Rev. Act. 1938, c. 289, 52 Stat. 447 4
Administrative Procedure Act, 5 U. S. C. A., Sec. 1001 et seq. 26

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,* vs. JOSEPH SUNNEN, *Respondent.*	}	No. 227.

BRIEF

Of Respondent in Opposition to Petition for Writ of Certiorari.

I.

STATEMENT OF CASE.

Petitioner's statement contains no reference to the following facts which we deem pertinent:

The manufacture and sale by Sunnen Products Company of the patented cylinder grinder, pin-hole grinder, and two

crank shaft grinders, pursuant to the royalty-license agreements executed by it and Mr. Sunnen, constituted more than half of the business of that company (R. 32).

The company employed from 90 to 220 persons, and paid them wages varying from approximately $189,000.00 per year to approximately $372,000.00 per year (R. 32).

The company owed its creditors amounts varying from approximately $123,000.00 to $574,000.00 (R. 32).

Mrs. Sunnen possessed a large independent fortune (R. 52).

The various assignments executed by Mr. Sunnen and delivered to his wife show clearly that in each case he assigned to her all of his right, title, and interest in and to the royalty-license agreements, and not merely his right to future royalties (R. 35-36, 38-39, 42, 45-46).

The decision of the Board of Tax Appeals in Mr. Sunnen's prior case, holding him not liable for 1929, 1930 and 1931 income taxes on cylinder grinder royalties paid to his wife, was based upon the finding that the royalty contract was an assignable property right, that the assignment vested the title to the income-producing property in Mrs. Sunnen, and that the royalty-license contract and not Mr. Sunnen produced the royalty income (R. 59-60).

II.

QUESTION PRESENTED.

On page 2 of the petitioner's brief he states his version of the question presented by this case. In his statement he refers to the royalty-license contracts as having been executed by Mr. Sunnen and his "controlled corporation."

We submit that the word "controlled" is unfair, and tends to prejudice this Court against the respondent. This claim of "control" is based on the fact that Mr. Sunnen owned 1,780 out of the 2,000 shares issued by the corporation (R. 26). However, ownership of a majority of stock in a corporation does not give the holder unqualified and absolute control over the corporation, especially where as here the stipulated facts show that a vote of three of the five directors of the company was required in order to take any action binding upon it (R. 32).

It is our opinion, therefore, that the question presented should be stated as follows: Whether a majority stockholder of a corporation, who owns patent applications and patents, who then enters into royalty-license contracts with the corporation for the manufacture and sale of the inventions, who subsequently assigns all of his right, title, and interest in and to such contracts to a minority stockholder of the corporation, and who thereafter notifies the corporation of such assignments, is taxable upon the royalties later paid by the corporation to the assignee.

This question is presented on the peculiar facts of this case. In our opinion, this Court will never again be called upon to pass upon similar facts.

III.

STATUTES AND REGULATIONS INVOLVED.

Petitioner contends that this case involves Sec. 22 (a) of the Internal Revenue Code (26 U. S. C., 1940 ed., S. 22); Sec. 22 (a) of the Revenue Act of 1938 (c. 289, 52 Stat. 447); Sec. 22 (a) of the Revenue Act of 1936 (c. 690, 49 Stat. 1648); Sec. 19.22 (a)-1 of Treasury Regulation 103; Art. 22 (a)-1 of Treasury Regulation 101, promulgated under the Revenue Act of 1938; and Art. 22 (a)-1 of Treasury Regulation 94, promulgated under the Revenue Act of 1936. (See pages 2-4 of petitioner's brief.)

We contend that the above mentioned sections of the Law and Regulations have no application to the case at bar. They merely define what constitutes taxable income. They say nothing about whether one person or another is taxable upon income as so defined. They contain not one word justifying the taxation of the royalties here involved to the respondent.

IV.

SUMMARY OF ARGUMENT.

FIRST.

A: The petitioner contends that the Circuit Court of Appeals' decision violates decisions of this Court holding that one who assigns the right to receive income, but retains ownership of the property producing that income, is, despite the assignment, taxable upon the income paid to the assignee. This contention is predicated on the argument that the royalty income paid to Mrs. Sunnen was produced, not by the royalty contracts assigned to her by respondent (her husband), but by the patents which he continued to own. The petitioner cites no cases of this Court, or any other Court, in support of such argument. The same argument was rejected by the Board of Tax Appeals in a prior case involving Mr. Sunnen. In the case at bar, the Tax Court refused to approve this argument, and the Circuit Court of Appeals flatly denied it. Numerous cases cited by us show that the income here involved was produced by the assigned royalty contracts. Especially analogous are cases involving leases assigned by a landowner, wherein it is held that the assignee is taxable upon the rent, despite the continued ownership of the land by the assignor. The patents and royalty contracts, as well as the land and leases, involve severable and distinct property rights, which should not be confused. The contrary view leads to absurd tax results.

B: In the alternative the petitioner argues that the Circuit Court of Appeals' decision violates decisions of this Court holding that even though one assigns income-producing property, he is taxable on the income produced thereby if he retains incidents of control sufficient to support the conclusion that he remains in substance the true owner of

the assigned property. Petitioner thus contends that the *Clifford* Doctrine should be applied to this case. He makes this claim despite the fact that a lawfully organized and operated business corporation, such as is here involved, is not the equivalent of a short-term family trust. He makes this claim despite the fact that Mr. Sunnen's rights (as patent owner and as majority stockholder of Sunnen Products Company), were insignificant; and the rights acquired by Mrs. Sunnen under the assignments—including the full right to sell the assigned contracts—exactly coincides with the normal conceptions of full ownership. Mrs. Sunnen's rights (as assignee of the royalty contracts and as minority stockholder of Sunnen Products Company) could not be defeated by any legal act of her husband. Self-interest of Mr. Sunnen, as majority stockholder, would have prevented him from illegally attempting to force the company to cancel the royalty contracts, or otherwise attempting to sabotage its business. In essence, the petitioner's argument seeks to predicate tax liability on power to misappropriate money of another. No Court should base a decision upon conjecture or possible fraud. This Court recently refused to do so in the *Wilcox* case involving embezzled money. Moreover, to base a finding of substantial ownership, upon the power of a majority stockholder over his corporation, violates the decision of this Court holding that even the power of a sole stockholder over a corporation does not justify taxing him upon the corporation's income. The petitioner's argument, therefore, obviously proves too much. It overlooks the fact that Mr. Sunnen could derive no economic gain from exercising any power possessed by him. It overlooks the fact that he had no lawful claim to these royalties. It ignores the substantial adverse interests posessed by Mrs. Sunnen. Any power possessed by Mr. Sunnen was conditioned on acts which he might not be able to perform, and was not the equivalent of "unfettered command." To tax Mr. Sunnen, or any taxpayer, upon in-

come which he cannot use to pay such taxes, seriously jeopardizes the Government's ability to collect its taxes—a matter just as important as proper assessment of taxes.

C: The petitioner contends that the Circuit Court of Appeals' decision violates decisions of this Court holding that earned income is taxable to the person who earned it. This contention is inconsistent with petitioner's argument that the patents produced the royalty income. Moreover, such contention is absurd. The royalties here involved were earned by the use of capital of Sunnen Products Company, and the labor of its employees, not by any personal services rendered by Mr. Sunnen.

SECOND.

As an afterthought, the petitioner contends that the judgment of the Circuit Court of Appeals violates decisions of this Court prescribing the scope of Appellate review of decisions of the Tax Court. The Circuit Court of Appeals was mindful of these decisions. Nevertheless, it held that if the Tax Court's finding be one of fact it was without warrant in the record, and if it be a conclusion of law it was without any reasonable basis in the law. In addition, we say that if the Tax Court's finding in the case at bar be considered one of fact, it cannot be decisive because it directly conflicts with that Court's own finding in Mr. Sunnen's prior case. However, we contend that the Tax Court's finding was one of law. It was based upon erroneous application of the law regarding corporate stockholders and assignments, and thus constituted an error of law. The Tax Court's ultimate finding of substantial ownership of income-producing property by Mr. Sunnen, involved the legal effect of admitted facts, and presented a pure question of law. The Tax Court's finding involved the construction and effect, under Missouri law, of various written instruments, which is a question of law. The Tax

Court's finding involved the power of misappropriation as an element of substantial ownership under the *Clifford* Doctrine, which this Court held in the *Wilcox* case to be a question of law. The Tax Court's finding involved an erroneous extension and misapplication of the decision of this Court in the *Clifford* case—a question of law. No cases cited by the petitioner disprove these statements.

THIRD.

This case involves no new question of law requiring consideration by this Court. Basically it involves only the question of whether the owner of income-producing property is taxable upon the income produced thereby. The petitioner's argument that the Circuit Court of Appeals' decision will cause a tax saving crusade, is belied by his failure to seek review of Mr. Sunnen's prior case, which was decided by the Board of Tax Appeals in 1935.

V.

ARGUMENT.

FIRST: The Decision of the Circuit Court of Appeals Does Not Conflict With Any Decision of This Court.

A. *Assignment of Income or Income-Producing Property.*

Petitioner first contends that the decision of the Circuit Court of Appeals conflicts with the decisions of this Court, cited on page 11 of his brief, holding that one who assigns the right to receive income, but retains ownership of the property producing that income, is, despite the assignment, taxable upon the income paid to the assignee.

This rule is clearly not applicable unless it can be said, as petitioner argues, that the royalty income paid to Mrs. Sunnen was produced by the patents and patent applications which Mr. Sunnen continued to own, and not by the royalty agreements which he assigned to her. *To support this argument, the petitioner cites no cases of this Court, or any other Court.*

This argument was rejected by the Board of Tax Appeals in Mr. Sunnen's prior case (R. 59-60). The Board cited many authorities,[1] including the closely analogous case of *Edward G. Swartz, Inc., v. Commissioner*, 5 Cir., 69 Fed. 2d 633, 635. In that case Mr. Swartz, who owned timber land, entered into a timber cutting contract with Bernard Cypress Company, providing for the payment to him of part of the profits derived from the cutting and sale of the timber. Subsequently, Mr. Swartz assigned all of his right, title, and interest in and to this contract to

[1] *Nelson v. Ferguson*, 3 Cir., 56 Fed. 2d 121, 124, cert. den. 286 U. S. 565 (wherein the assignee of the royalty contract had no interest whatever in the patent); *Leydig v. Commissioner*, 15 B. T. A. 124, affd. 10 Cir., 43 Fed. 2d 494; *Field v. Commissioner*, 2 Cir., 42 Fed. 2d 820, 822; *Copland v. Commissioner*, 7 Cir., 41 Fed. 2d 501, 504; *Smith et al., Extrs., v. Commissioner*, 25 B. T. A. 291; *Lowery v. Helvering*, 2 Cir., 70 Fed. 2d 713, 714.

Edward G. Swartz, Inc., in exchange for all of its stock except two qualifying shares. Swartz, however, individually retained ownership of the lands. In answer to the contention of the corporation that all income paid by the Cypress Company was taxable to Mr. Swartz individually, the Court on page 635 said:

> "Here the creator (Swartz) has assigned to the creature (Edward G. Swartz, Inc.) the thing itself from which the income flows. Before the assignment Swartz was the owner of the income because he owned the contract which yielded it. After the assignment the company owned the income, for after it the contract was not Swartz's but its own. The petitioner's claim that it was not the owner of the income because Swartz had not assigned to it the timber but only the contract, is without merit. The actual, the present interest in the timber, the right to have it cut and marketed, and the right to the proceeds from that cutting and marketing, Swartz, by assigning the right and title to the contract, assigned to petitioner. Unless and until there was a breach sufficient to authorize cancellation of the contract, the right Swartz had in the timber was the right to insist that it be cut as the contract provided, and that he receive for it the price the contract fixed. These rights he fully assigned to petitioner. The ownership of these rights involved, it drew to itself all that proceeded from the contract. The owner of these rights was the owner of the income they produced. Nothing in the *Earl Case* (281 U. S. 111, 74 L. Ed. 731), or in those which have followed it, makes these payments taxable to Swartz. To tax Swartz and not petitioner would, we think, be to impose a tax on one on account of the income of another." (Citing *Poe v. Seaborn*, 282 U. S. 101, 51 S. Ct. 58, 75 L. Ed. 239; *Hoeper v. Tax Commission*, 284 U. S. 206, 52 S. Ct. 120, 76 L. Ed. 248, and other cases.)

Even the Tax Court, in the case at bar, did not repudiate the principle that a contract right to a certain percentage

of the royalties on an invention is itself income-producing property and the holder of such right is taxable on the royalties paid thereunder. This is clearly shown by *Strauss v. Commissioner*, 8 T. C. No. 121, CCH Decision No. 15,787, decided May 15, 1947. In that case the Tax Court held that a husband, who helped finance the development and patenting by others of a process for making colored film known as Kodachrome, who for such financial assistance acquired a right to receive a certain percentage of royalties on and an interest in the process, and who later, as a gift, assigned to his wife (who had no interest whatever in the patents) all of his "right, title, and interest in Kodachrome," was not taxable on royalties subsequently paid to his wife. *Sunnen v. Commissioner*, 6 T. C. 431, was distinguished solely because of the alleged control possessed by Mr. Sunnen over Sunnen Products Company.

The petitioner's argument that the patent and patent applications produced the royalties paid to Mrs. Sunnen was also flatly rejected by the Circuit Court of Appeals in the case at bar (R. 95, 96).[2]

Moreover, the petitioner's argument conflicts with the fundamental principles enunciated in the following cases, which have never been repudiated by this Court: *Lilienfeld v. Commissioner*, 35 B. T. A. 391, 395 (acquiesced in by Commissioner, 1937—1 C. B. 15), (involving royalty contracts assigned to wife who had no interest in patent); *Timken, Est. of H. H. v. Commissioner*, 47 B. T. A. 494, affd. 6 Cir., 141 Fed. 2d 625 (note with past due interest assigned); *Ray, Rose L. v. Commissioner*, P-H, B. T. A. Memo. Decision Par. 41,325, CCH Decision No. 11,874A (oil

2. The Circuit Court of Appeals cited *Commissioner v. Field*, supra; *Lowery v. Helvering*, supra; *Hall v. Burnett*, App. D. C., 54 Fed. 2d 443, 446, cert. den. 285 U. S. 552; *Nelson v. Ferguson*, supra; *Helvering v. Seatree*, App. D. C., 72 Fed. 2d 67, 68; *Shanley v. Bowers*, 2 Cir., 81 Fed. 2d 13, 15; *Commissioner v. O'Donnell*, 9 Cir., 90 Fed. 2d 907, 910, revd. on other grounds, 303 U. S. 370; *Commissioner v. Ross*, 6 Cir., 83 Fed. 2d 18, 19, 20; *Lum v. Commissioner*, 3 Cir., 147 Fed. 2d 356, 357; and *Blair v. Commissioner*, 300 U. S. 5, 13.

and gas leases assigned); *Commissioner v. Montgomery*, 5 Cir., 144 Fed. 2d 313, 316 (construction contract assigned to family corporation by majority stockholder); *Fox v. Commissioner*, 37 B. T. A. 271, 278 (royalty contract assigned to corporation by sole stockholder); *Montgomery v. Thomas*, 5 Cir., 146 Fed. 2d 76, 80 (stock in family corporation purchased for children by majority stockholder); *Ross, Est. of W. L. v. Commissioner*, T. C. Memo. Opinion, 2 T. C. M. 573, 575, CCH Decision No. 13,416M (contract assigned); *Allen v. First National Bank and Trust Company*, 5 Cir., 157 Fed. 2d 592 (life interest in trust corpus assigned), cert. den. on March 3, 1947, 91 L. Ed. 691; *Porter Royalty Pool, Inc., v. Commissioner*, 7 T. C. 685, 696-697, CCH Decision No. 15,362 (interest in oil leases assigned to corporation by landowner); *Funk, W. J., v. Commissioner*, T. C. Memo. Opinion, 3 T. C. M. 100, CCH Decision No. 13,727M, 1947, P-H, T. C. Memo. Decision Par. 44,030, and *Funk, E. M., v. Commissioner*, 7 T. C. 890, CCH Decision No. 15,397 (both involving stock in family corporation assigned by President and majority stockholder); and *Wheelock v. Commissioner*, 7 T. C. 98, CCH Decision No. 15,216 (stock in family corporation assigned by President and majority stockholder). Compare also *Friedman v. Commissioner*, 45 B. T. A. 976, 983, affd., 4 Cir., 130 Fed. 2d 305 (involving assigned attorney-client contract).

In addition, we desire to point out that to adopt the petitioner's argument—to hold that the patents were the income-producing property—would lead to such absurd tax results as taxing a person who might buy the patents from Mr. Sunnen on royalties paid after such purchase to Mrs. Sunnen; and taxing Mr. Sunnen, if he retained the patents, on royalties paid to one who might buy the royalty contracts from Mrs. Sunnen. The property rights involved in the patents and contracts were separate and distinct.

Clearly these royalties were produced by the royalty contracts. Without them Mr. Sunnen's patents and patent applications would not have been exploited. No labor or capital would have been used to make and sell these grinding machines, and no royalties would have been paid to anyone. Unexploited patents never produce income. The actual and present interest in the patents, the right to have the patented devices manufactured and sold, and the right to a part of the proceeds of that manufacture and sale, Mr. Sunnen, by assigning all of his interest in the royalty contracts, assigned to Mrs. Sunnen. These views, which are in accord with principles long since firmly established by this Court, were adopted by the Circuit Court of Appeals in the case at bar. In its opinion the Circuit Court of Appeals said:

> "Unlike the transactions involved in *Helvering v. Horst,* supra; *Harrison v. Schaffner,* supra, and other cases cited supra, here the assignments of the royalty contracts were conveyances *in praesenti* of vested income-producing property rights. They were not mere gifts of money payable in the future from the earnings of the donor or from income-producing property owned by him. A royalty contract resembles a lease of real property and the royalties payable thereunder are analogous to rent. Had the royalty contracts not been assigned in the present case the royalties when paid to Sunnen would have been income taxable to him, the same as rents are taxable to the landlord. *Burnet v. Harmel,* 287 U. S. 103, 108. After the assignments the royalties were 'no more the income of the donor than would be the rent from a lease or a crop raised on a farm after the leasehold or the farm had been given away.' *Helvering v. Horst,* supra, 311 U. S. at page 119" (R. 96).

Nevertheless, on page 16 of his brief, the petitioner seeks to void the clear language used by this Court in the *Horst* case, supra. He argues that for a landowner to be relieved

from income taxes on rent paid under a lease assigned by him, the landowner must also assign his entire interest—the land as well as the lease. This argument is directly contrary to *Lum v. Commissioner,* supra; *Edward G. Swartz, Inc., v. Commissioner,* supra; and *Porter Royalty Pool, Inc., v. Commissioner,* supra. Compare also *J. S. Abercrombie Co. v. Commissioner,* 7 T. C. 120, affd. by the Circuit Court of Appeals of the Fifth Circuit on June 25, 1947, ... Fed. 2d ..., 1947 CCH Standard Federal Tax Reporter, Vol. 4, Par. 9301, holding that assignees were taxable for income accruing to their interests under assigned oil and gas leases, despite reservations of capital investment in minerals by assignors.

Ward v. Commissioner, 9 Cir., 58 Fed. 2d 757, 760, cited by petitioner on page 16 of his brief, is distinguishable because there the taxpayer assigned rentals only and not the income-producing leases. This case does not conflict with *Lum v. Commissioner,* supra, or with the other cases cited above.

We contend, therefore, that as Mr. Sunnen retained no income-producing property—that as he parted with the corpus—the decision of the Circuit Court of Appeals in the case at bar does not conflict with the decisions of this Court cited on page 11 of the petitioner's brief.[3]

B. *Substantial Ownership of Property—The Clifford Doctrine.*

The petitioner next argues that the decision of the Circuit Court of Appeals violates this Court's decision in *Helvering v. Clifford,* 309 U. S. 331, because, even though Mr. Sunnen may have made a legally perfect gift of income-

3 In making this contention we are giving to *Helvering v. Horst,* 311 U. S. 112; *Helvering v. Eubank,* 311 U. S. 122, and *Harrison v. Schaffner,* 312 U. S. 579, the meaning ascribed thereto by this Court in *Pearce v. Commissioner,* 315 U. S. 543, 554.

producing property, he retained incidents of control sufficient to support the conclusion that he was in substance the true owner of the property. The petitioner makes this contention despite the fact that no trust is involved in the case at bar and the Circuit Court of Appeals of the Fifth Circuit in *Commissioner v. Montgomery*, 144 Fed. 2d 313, 316, said: "*A lawfully organized and operated business corporation is not the equivalent of a trust.*" Furthermore, the petitioner alleges that the *Clifford* Doctrine is applicable even though Judge Magruder in *U. S. v. Morss*, 1 Cir., 159 Fed. 2d 142, 143, 146, pointed out that such doctrine applies only where the retained property rights coincide substantially "with the normal concepts of full ownership," and where the rights given away are "insignificant."

We contend that the *Clifford* Doctrine cannot be enlarged and extended to cover this case. This is apparent when we weigh both the property rights given to Mrs. Sunnen, and the property rights, if any, retained by Mr. Sunnen.

When the assignments were delivered to Mrs. Sunnen, and Sunnen Products Company received notice thereof, she acquired the following rights: the right to sell, assign, give away, pledge, or otherwise dispose of the royalty contracts—*rights which Mrs. Clifford did not possess* (309 U. S. at page 333)—; the right to cancel the royalty contracts in accordance with their terms; the right, with the consent of Sunnen Products Company, to alter or amend the royalty contracts so as to provide for greater or lesser royalties, payment of minimum royalties, etc.; the right to sue to enforce performance in good faith by Sunnen Products Company of such contracts; and the right to sue for damages for the breach thereof. In addition, Mrs. Sunnen, as bona fide assignee, had the right to claim the protection of the Courts of law and equity against any unauthorized, collusive, or arbitrary action by Mr. Sunnen, as assignor or as majority stockholder of Sunnen Products

Company, tending to interfere with, or defeat her rights. 4 *Am. Jur., "Assignments,"* Sec. 105, p. 312; 6 *C. J. S.*, s. 96, p. 1152, s. 101, p. 1158. Even the Commissioner's own Regulation[4] provides that where a transferee of property has such power over the property transferred, the *Clifford* Doctrine imposes ownership, and tax liability, on such transferee. See also *Richardson v. Commissioner*, 2 Cir., 121 Fed. 2d 1, 3, cert. den. 314 U. S. 684; *Jergens v. Commissioner*, 5 Cir., 136 Fed. 2d 497, 498; *Emery v. Commissioner*, 1 Cir., 156 Fed. 2d 728, 730; and *Conant v. Commissioner*, 7 T. C. 453, 461, all holding that transferees having analogous, or even lesser powers, to deal with corpus of the property transferred are to be deemed the substantial owners of such property.[5] It is clear, therefore, that the rights and powers given to Mrs. Sunnen, as assignee, are anything but "insignificant."

And in addition to these rights possessed by Mrs. Sunnen, as assignee, she possessed all rights incident to her ownership of 200 shares of stock of Sunnen Products Company (R. 26). Such rights gave her the power to prevent Mr. Sunnen, as majority stockholder of the company, from taking any steps to force the company to cancel the royalty contracts, and thus lose over one-half of its profitable business (R. 32). Regarding the duty of majority stockholders to use their power fairly and for the best interests of the corporation and its minority stockholders, see 13 *Fletcher, "Cyclopedia of the Law of Private Corporations,"* pages 137, 141, 144, 147, 154, 156; 18 *C. J. S.*, page 1194; 13 *Am. Jur.*, page 477; and *Pepper v. Litton*, 308 U. S. 295, 306, 307, 311, which clearly points out that dominant stockholders must act in good faith, with in-

4 Regulation 111, Sec. 29.22 (a)-22, 4 CCH Par. 86B:—"Where a person other than the grantor of property transferred in trust has a power exercisable solely by himself to vest the corpus or income therefrom in himself, the income therefrom shall be included in computing the net income of such person."

5 Compare also *Mallinckrodt v. Nunan*, 8 Cir., 146 Fed. 2d 1; *Busch v. Commissioner*, 8 Cir., 148 Fed. 2d 798.

herent fairness to the corporation, its minority stockholders, and others interested in it, cannot use their powers in disregard of the standards of common decency and honesty, cannot do indirectly through the corporation what they could not do directly, and cannot use their power for their personal advantage, no matter how absolute that power may be.[6]

Let us turn now to the powers which petitioner claims that Mr. Sunnen reserved. These are described on pages 14 and 15 of his brief. These powers were all called to the attention of the Circuit Court of Appeals, were evaluated by it, and were held to be too nebulous to justify imposition of income tax liability on Mr. Sunnen.

In addition to the reasons given by the Circuit Court of Appeals for its views, we wish to call attention to the following facts: The royalties paid were 10% of the gross sales. Mrs. Sunnen received, during the five years here involved, over $261,000.00 (R. 30). Gross sales of said machines amounted to over $2,610,000.00. These sales constituted over half of the business of Sunnen Products Company (R. 32). Mr. Sunnen owned 1,780 shares, Mrs. Sunnen owned 200 shares, and others connected with the company owned the balance of 20 shares of the company's stock (R. 26). Consequently, if Mr. Sunnen had attempted to use his voting powers to elect directors committed to a

6 That income tax liability cannot be predicated upon the power of a majority stockholder was also recognized in the following cases: *Fox v. Commissioner*, supra, where the taxpayer was sole stockholder of the corporation; *Commissioner v. Montgomery*, supra, where the taxpayer was a director, president, and owner of two out of three shares of the voting stock; *Commissioner v. Greenspun*, 5 Cir., 156 Fed. 2d 917, where the taxpayer was sole stockholder and president of the company; *Funk, W. J., v. Commissioner*, supra, where the taxpayer was a director and owned all voting stock; *Wheelock v. Commissioner*, supra, where taxpayer was president and held proxies to vote all stock; *Edward G. Swartz, Inc., v. Commissioner*, supra, where taxpayer owned all except qualifying shares; *Bear Gulch Water Co. v. Commissioner*, 9 Cir., 116 Fed. 2d 975, holding private corporation taxable on its income although all of its stock was held by a tax-exempt State University; and *Moline Properties, Inc., v. Commissioner*, 319 U. S. 436, holding corporation taxable on gains from sales made by it although one man owned all of its stock.

program of cancelling the royalty contracts, he would have harmed himself more than anyone else—would have seriously depreciated the value of his own stock.[7] Therefore, it is not realistic to assume that he would have taken such action. It is not realistic to assume that he would have been willing to thus depreciate the value of the minority stock interests. It is not realistic to assume that he would have thus jeopardized the company's power to pay its debts.[8] It is not realistic to assume that he would have thus destroyed the carefully trained organization which the company had built up.[9] It is not realistic to assume that he would have been willing to thus defraud his wife of the rights which he had given her as assignee, or to assume that she would have agreed to a course of action depriving her of over $261,000.00.

It is no answer to say, as does petitioner in footnote 5 on page 14 of his brief, that cancellation of the royalty contracts would not necessarily have been a fraud on the company, because Mr. Sunnen and the company could then have entered into contracts more favorable to it. Any such substituted contracts, if more favorable to the company, would have clearly defrauded Mrs. Sunnen of her rights as assignee of the original contracts. And we must base this case on what was done, not what might have been done.

Nor is the petitioner's case helped by saying that Mrs. Sunnen had no standing to complain of cancellation by the company, since the contracts gave it the right to cancel upon notice. Surely petitioner does not seriously believe

---

7 Similar self-interest prevented application of the *Clifford* doctrine in *Wachovia Bank & Trust Company, Trustee, et al. v. Commissioner*, 3 TCM 595, 601, CCH Decision No. 14,001M, 1944 P-H, TC Memo Decision Par. 44,217; and in *Wheelock v. Commissioner*, 7 T. C. 98, 107. Moreover, for the same reasons, self-interest on the part of Mr. Sunnen would have prevented him from granting licenses to competitors of Sunnen Products Company.

8 See (R. 32) for amount of debts owed by Sunnen Products Company.

9 See (R. 32) for number of employees of Sunnen Products Company.

that these contract provisions would have prevented Mrs. Sunnen, as assignee and minority stockholder, from objecting to Mr. Sunnen arbitrarily and unfairly doing indirectly through the corporation what he could not do directly, in derogation of the interests of the corporation, its minority stockholders, and its creditors.

In effect, therefore, the petitioner bases his case on Mr. Sunnen's alleged power to wrongfully misappropriate his wife's money—to do so in violation of all standards of decency and common honesty. Petitioner's argument is substantially the same as that advanced by him in *Commissioner v. Wilcox* (327 U. S. 404, 407), but this Court rejected such argument on the ground that Wilcox had no rightful claim to the funds involved. As the Circuit Court of Appeals said in its decisions in the case at bar (R. 97), "Neither the Tax Court nor this Court should base a decision upon conjecture or possible fraud." As the Tax Court said in *Wheelock v. Commissioner*, supra (4 T. C. 98, 107), taxation should be upon a base more stable than power of a taxpayer to sabotage his company, or to make or break the business.[10]

Moreover, we wish to point out that acceptance of Commissioner's views will have far reaching and dangerous consequences. The petitioner says that Mr. Sunnen's power (as majority stockholder, as President, and as owner of property leased to the corporation) to affect the amount of income paid to his wife, is a sufficient basis for requiring him to pay a tax upon that income. But such a holding would logically require that he be taxed upon all income of the Sunnen Products Company, for he had just as much power over its entire income as he did over the 10% royalties paid by it to Mrs. Sunnen. And to hold him taxable

[10] In *Wheelock v. Commissioner*, supra, the taxpayer was president of an incorporated advertising business, and had power to vote all stock of the company.

on all of the corporation's income would clearly violate *Moline Properties, Inc., v. Commissioner*, supra, wherein even a sole stockholder was held not taxable upon the income of the corporation. Furthermore, to hold that Mr. Sunnen's alleged power to end his wife's right to receive royalties imposes tax liability upon him, logically requires that every majority stockholder be held taxable for dividends upon callable stock issued by a corporation to parties in no way connected with such majority stockholder, and be held taxable for rent paid by the corporation under cancellable leases held by strangers.

It seems to us, therefore, that petitioner's arguments obviously prove too much. They overlook the substantial adverse interests possessed by Mrs. Sunnen and others similarly situated.[11] They ignore the principle that powers which are not presently exercisable, and may never be capable of being exercised, do not exist[12]—that powers conditioned on acts which one may not be able to perform, are not the equivalent of "unfettered command."[13] They overlooked the fact that powers of control and management, no matter how unlimited and absolute they may be, are not a sufficient basis for imposition of tax liability, unless the possessor could derive economic gain from the exercise thereof. This proposition was clearly stated in

---

11 An adverse interest is no less adverse because held by one's wife. Her identity cannot be merged with that of her husband. The history of divorce courts, and the modern tendency toward recognition of separate legal rights in wives, opposes such an approach. *Wheelock v. Commissioner*, supra. See also *Commissioner v. Branch*, 1 Cir., 114 Fed. 2d 985, 987, pointing out that the Clifford Doctrine does not obliterate the separate legal personality of a wife; and *Backus, Est. of Standish v. Commissioner*, 6 TC 1036, 1046, CCH Decision No. 15,142, holding that a husband is not the alter ego of his wife. The presence of adverse interests prevented application of the Clifford Doctrine in *Commissioner v. Betts*, 7 Cir., 123 Fed. 2d 534, 537-540; and *Commissioner v. Katz*, 7 Cir., 139 Fed. 2d 107, 110. Compare also *Reinecke v. Northern Trust Co.*, 278 U. S. 339, 346, holding that power to revoke a trust, with consent of a person having an adverse interest, does not prevent the immediate shifting of economic benefits.

12 *Corning v. Commissioner*, 6 Cir., 104 Fed. 2d 329, 332, citing 1 Sugden on Powers, 3d Am. Ed. 371, 372.

13 *Shanley v. Bowers*, 2 Cir., 81 Fed. 2d 13, 15.

Commissioner v. Wilcox, supra, wherein this Court said that the very essence of taxable income is the accrual of some gain, profit, or benefit to the taxpayer, and that mere dominion over money or property is not decisive in all cases.[14]

In addition, it is not reasonable, just, or expedient to the government, to impose income taxes upon Mr. Sunnen in respect of income which he can never use to pay such taxes. Such taxation violates the principle that graduated income taxes should be levied according to ability to pay. Such taxation violates *Hoeper v. Tax Commission*, 284 U. S. 206, 215, holding it unconstitutional to tax one person upon the income of another. And, such taxation seriously jeopardizes the Government's ability to collect its taxes (especially when tax rates reach 91%)—a matter which is just as important as the proper assessment of taxes. No doubt these considerations cause Congress to refuse to tax husband and wife as one, though urged to do so.[15] No doubt these considerations caused Congress to refuse to make the family the taxable unit, and caused it to permit a taxpayer to minimize his taxes by making gifts of income-producing property to others, including members of his family.[16]

For these reasons, we submit that the rights and powers acquired by Mrs. Sunnen were of far greater magnitude than those possessed by her husband, that he cannot fairly

---

14 See also *Jones v. Norris*, 10 Cir., 122 Fed. 2d 6, 11; *Commissioner v. Betts*, 7 Cir., 123 Fed. 2d 534, 537; *Cushman v. Commissioner*, 2 Cir., 153 Fed. 2d 510, 513, 514. Compare the following cases where the Clifford Doctrine was not applied despite broad powers of control and management possessed by settlor: *Commissioner v. Branch*, 1 Cir., 114 Fed. 2d 985, 987; and *Suhr v. Commissioner*, 6 Cir., 126 Fed. 2d 283, 287.

15 See Revenue Bill of 1941, H. R. 5417, as introduced, 77th Cong., First Session, Sec. 111; H. Rep. No. 1040, 77th Cong., First Session, p. 10, Cong. Rec., Vol. 87, Part 6, pp. 6727-6732; "Mandatory Joint Returns," Joint Committee on Internal Revenue Taxation, U. S. Government Printing Office, 1941.

16 *U. S. v. Morse*, 159 Fed. 2d 142, 143.

be treated as the full owner of property which his wife could freely sell or otherwise dispose of, and that the Circuit Court of Appeals decision in the case at bar does not violate *Helvering v. Clifford*, supra. Every possible argument for using that case to justify taxing Mr. Sunnen upon these royalties, can be repeated with greater force and effect to justify taxing such income to Mrs. Sunnen.

C. *Earned Income.*

As pointed out above, the petitioner contends that Mr. Sunnen's patents and patent applications produced the royalty income here involved. However, he apparently also contends that these royalties were income earned by Mr. Sunnen, for he cites, on page 11 of his brief, *Lucas v. Earl*, 281 U. S. 111, and *Commissioner v. Tower*, 327 U. S. 280. These contentions are inconsistent.

Moreover, any claim that these royalties constitute earned income of Mr. Sunnen is obviously absurd. The royalties were but a part of the income earned by Sunnen Products Company, which supplied the labor and capital necessary to manufacture and sell the grinding machines—a fact always recognized by petitioner when requiring Sunnen Products Company to pay taxes upon its income. Customers of Sunnen Products Company bought and paid for the machines, not services rendered by Mr. Sunnen.

In Mr. Sunnen's prior case the Board of Tax Appeals recognized these facts, also pointed out that the royalties did not represent payment for services rendered by Mr. Sunnen to Sunnen Products Company, and distinglished *Lucas v. Earl*, supra (R. 58-59). *Lucas v. Earl*, supra, was also distinguished by the Circuit Court of Appeals in the case at bar (R. 95).

For the same reasons, *Commissioner v. Tower*, supra, is distinguishable, because in that case the evidence amply

justified the Tax Court's holding that the income was in fact earned by the husband (327 U. S. at page 284). Moreover, the *Tower* case is distinguishable on the ground that Mr. Tower never executed a completed gift of property to his wife (327 U. S. at page 283), whereas, in the case at bar, the validity of Mr. Sunnen's gift is conceded.

SECOND: **The Judgment of the Circuit Court of Appeals Reflects No Abuse of Its Power to Review the Decision of the Tax Court.**

As an afterthought, occurring after the rendition of the Circuit Court of Appeals' decision, the petitioner contends that the judgment of that Court reflects an abuse of its power to review the decision of the Tax Court.

However, the Circuit Court of Appeals did not overlook the doctrines enunciated in *Dobson v. Commissioner*, 320 U. S. 489, 501, rehearing den. 321 U. S. 231, and companion cases. In its opinion it distinguished the *Dobson* case, stating:

> "If, therefore, the finding of the Tax Court that Sunnen could control or defeat the payment of royalties to his wife be considered a finding of fact it is without 'warrant in the record,' and if it be regarded as a conclusion of law it is without 'any reasonable basis in the law'" (R. 98).[17]

If the finding of the Tax Court be one of fact, it may be reviewed because it is without warrant in the record. Under such circumstances the Appellate Court may draw its own inferences, and make its own conclusions. *Hatfried, Inc., et al. v. Commissioner*, decided June 11, 1947, 3 Cir., ... Fed. 2d ..., CCH 1947 Standard Federal Tax Reporter,

[17] The language used is correctly quoted from the typewritten opinion of the Circuit Court of Appeals. The same language appears in *Sunnen v. Commissioner*, 8 Cir., 161 Fed. 2d 171, at p. 177. The Record, on p. 98, is erroneously printed.

Vol. 4, Par. 9294, at page 12,647;[18] and *Commissioner v. Scottish American Investment Co., Ltd.*, 323 U. S. 119, 124. *Certainly these rules apply where the Tax Court's finding in the case at bar is exactly contrary to its finding in Mr. Sunnen's prior case.*

In our opinion, however, the Tax Court's finding was one of law.

In the case at bar the Tax Court, following *Dodson, Estate of J. G. v. Commissioner*, 1 T. C. 416, 423, found that cancellation by a corporation of a contract was equivalent to unilateral action by its majority stockholder. This finding involved erroneous application of the law regulating the rights and duties of majority and minority stockholders, and the rights and duties of assignors and assignees of property. The Tax Court thus committed errors of law. Its decision was mere fiating, and may be reversed. *Commissioner v. Greenspun*, 5 Cir., 156 Fed. 2d 917, 921. Compare *Howell Turpentine Company v. Commissioner*, 5 Cir., ... Fed. 2d ..., 474 CCH, Par. 9281, at page 12,610, holding that if the Tax Court's finding would not have been made but for misconceptions of law, the Appellate Court may review and reverse the case.

The Tax Court's ultimate finding that Mr. Sunnen remained in substance the owner of the income-producing property, being based upon the construction and effect of written instruments, presents a pure question of law. *Commissioner v. Wilson*, 7 Cir., 125 Fed. 2d 307, 309; and *Sunderland v. Commissioner*, 3 Cir., 151 Fed. 2d 675, 679. To the same effect, although not stressing the importance of written instruments, are *Hallowell v. Commissioner*, 3 Cir., 160 Fed. 2d 536, 538; *Hawkins v. Commissioner*, 5 Cir., 152 Fed. 2d 221, 223; and *Armstrong v. Commis-*

[18] Hereinafter, for the sake of brevity, the 1947 CCH Standard Federal Tax Reporter, Vol. 4, is cited "474CCH".

sioner, 10 Cir., 143 Fed. 2d 700, 701. Compare *Thornley v. Commissioner*, 3 Cir., 147 Fed. 2d 416, 420, in which the Court held that if the taxable consequences of a transfer of property had to be determined from various written instruments, the question was one of law—citing the following language from *Helvering v. Tex.-Penn. Co.*, 300 U. S. 481, 491:

> "The ultimate finding * * * is a conclusion of law or at least a determination of a mixed question of law and fact. It is to be distinguished from the primary, evidentiary, or circumstantial facts. It is subject to judicial review, and on such review the court may substitute its judgment for that of the Board."[19]

The Tax Court's finding, that Sec. 22 (a) of the Internal Revenue Code as construed in *Helvering v. Clifford*, supra, required Mr. Sunnen to be treated as a substantial owner of the income-producing property, was necessarily based on the theory that he could, through devious and indirect means, wrongfully misappropriate his wife's royalties. In *Commissioner v. Wilcox*, supra, this Court held that whether the substantial ownership doctrine, derived from Sec. 22 (a) as construed in *Helvering v. Clifford*, supra, could be based upon the power or act of misappropriating the funds of another, was a pure question of law (327 U. S. at pages 407 and 410).

The petitioner contended before the Tax Court in the case at bar, and the Tax Court found, that the purpose and intent of Sec. 22 (a) of the Internal Revenue Code (and similar sections of prior Revenue Acts), as construed in *Helvering v. Clifford*, supra, required the holding that

---

[19] The following cases also hold that the construction, effect and interpretation of written instruments involved a question of law: *Crowe v. Geary State Bank*, 123 Fed. 2d 513, 516; *People v. Marsicano*, 135 P. 2d 16, 20, 57 Calif. App. 2d 591; *Horvath v. Sheridan, Wyoming Coal Co.*, 131 P. 2d 315, 321, 58 Wyo. 211; *Atwood v. City of Boston*, 37 N. E. 2d 131, 134, 310 Mass. 70; *Solace v. T. J. Moss Tie Co.*, 142 S. W. 2d 1079, 1081; *Battista v. Horton, Myers & Raymond*, 128 Fed. 2d 29, 31.

Mr. Sunnen was taxable upon this income. In *Bingham v. Commissioner*, 325 U. S. 365, and *McWilliams v. Commissioner*, ... U. S. ..., 91 L. Ed. 1383, 1388, this Court held that a determination of the purpose of a Section of the Internal Revenue Code raises a reviewable question of law.[20]

In the case at bar there was no conflict in the evidence. The only question involved was the legal effect of admitted facts. This is a question of law. *Nelson v. Montgomery Ward and Company, Inc.*, 312 U. S. 373, 376.[21]

The Tax Court based its decision in the case at bar upon its own decision in *Dodson, Estate of J. G., v. Commissioner*, supra (R. 72). The *Dodson Estate* case was decided as it was, out of deference to *Helvering v. Clifford*, supra. A decision of the Tax Court, which misinterprets or misapplies a prior decision of this Court, involves a reviewable question of law. *Merten's "Law of Federal Income Taxation,"* Vol. 9, pocket supplement, Sec. 51.19, p. 101; and *Denholm & McKay Realty Company v. Commissioner*, 1 Cir., 139 Fed. 2d 545, 550.[22] Certainly this rule applies to a case such as the case at bar, where the

20 See also *Lincoln Electrical Co. v. Commissioner*, 6 Cir., ... Fed. 2d ...., 474 CCH, Par. 9282, at page 12,614, interpreting the *Bingham* case, supra, and pointing out that the power to review decisions of the Tax Court has been broadened by the Administrative Procedure Act (5 U. S. C. A., Sec. 1001, et seq.). Compare *Crane v. Commissioner*, ... U. S. ....., 91 L. Ed. 931, 938.

21 See also *Farmer v. Commissioner*, 10 Cir., 126 Fed. 2d 542, 543, holding that where there is no conflict in the evidence, the legal conclusions to be drawn therefrom present questions of law; *Wolkowsky v. Goodkind*, 14 So. 2d 398, 402, 153 Fla. 267, holding that the legal effect of evidence is a question of law; *Blank v. Coffin*, 126 P. 2d 868, 870, 20 Calif. 2d 457, holding that whether a particular inference can be drawn from certain evidence is a question of law; *Titus v. Stouffer*, 40 N. E. 2d 178, 183, holding that if the facts are admitted, a question of law is presented; and *Howard v. Texas Owyhee Mining and Development Co.*, 115 P. 2d 749, 754, 62 Idaho 707, holding that proper application of law to undisputed facts involves a question of law.

22 Compare *Commissioner v. U. S. Trust Company*, 2 Cir., 143 Fed. 2d 243, 245, where the Tax Court's decision was reversed because of misconstruction of *Helvering v. Enright*, 312 U. S. 636; and *Hawkins v. Commissioner*, supra, where the Tax Court was reversed because of misapplication of previous decisions of the Circuit Courts of Appeal.

facts are so radically different from those involved in the *Clifford* case, and where the Internal Revenue Code contains no guides.

The three Circuit Court of Appeals cases cited by the Commissioner on page 17 of his brief[23] are distinguishable from the case at bar. All of them involved radically different facts. None of them involved erroneous application, or failure to apply, fundamental legal principles. None of them involves a finding of ownership based upon power wrongfully to misappropriate the funds of another. They merely hold that where the facts furnish ample and substantial support for the Tax Court's finding, that finding will not be reversed. Such is not true in the case at bar. Moreover, contrary to petitioner's claim, none of these three decisions contained one word in support of the proposition that the ultimate finding of substantial ownership is a question of fact, and not a question of law.

Likewise, *Helvering v. Clifford*, 309 U. S. 331, and *Helvering v. Stuart*, 317 U. S. 154, cited on page 17 of petitioner's brief, are not in point. Both of them were decided before *Dobson v. Commissioner*, 320 U. S. 489, and furnish no aid in applying the *Dobson* rule.

For all of these reasons we submit that the Circuit Court of Appeals' decision in the case at bar involves no abuse of its powers of review.

THIRD: **The Case at Bar Presents No New Question of Law Requiring Consideration by This Court.**

The basic question involved in this case is whether or not the admitted owner of property is taxable upon income produced thereby. This question has been answered in

[23] *Hash v. Commissioner*, 4 Cir., 152 Fed. 2d 722; *Eisenberg v. Commissioner*, 3 Cir., 161 Fed. 2d 506, cert. applied for; and *Littel v. Commissioner*, 154 Fed. 2d 922, 2 Cir.

the affirmative ever since the inception of taxes upon income. Such an answer was expressly approved by this Court in *Hoeper v. Tax Commission*, supra; *Blair v. Commissioner*, supra, and *Pearce v. Commissioner*, supra. No reason exists for this Court to again pass upon so elementary a matter.

Nor will the decision of the Circuit Court of Appeals in the case at bar stimulate any tax saving plans. Here, the assignor happened to be a majority stockholder of a corporation, and the assignee happened to be a minority stockholder. These facts are peculiar to this case. Similar facts are not likely to occur again. Moreover, the petitioner's claim that the Circuit Court of Appeals' decision will start a tax saving crusade is belied by the fact that he sought no review of the exactly comparable decision rendered by the Board of Tax Appeals in 1935 (R. 60).

CONCLUSION.

It is, therefore, respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for a writ of certiorari should be denied.

C. P. FORDYCE,
Counsel for Respondent.

Dated August 15, 1947.